

The ALJ found that claimant failed to establish that he is permanently and totally disabled as a result of his December 28, 2000 compensable injury. Accordingly, the ALJ

limited claimant's award to 37.5 percent permanent partial disability based on his functional impairment to the body as a whole.¹

The claimant requests the Board review the ALJ's denial of his request for permanent total disability benefits. Claimant maintains he met his evidentiary burden and has established that he has demonstrated he is "essentially and realistically unemployable" and is entitled to compensation for permanent total disability.²

Respondent argues that claimant is not permanently totally disabled, but is permanently partially disabled, and therefore the ALJ's award should be affirmed in all respects.

The sole issue before the Board is whether claimant is permanently and totally disabled as defined by K.S.A. 44-510c(a)(2).³

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets forth findings of fact which summarize the record in some detail. It is not necessary to repeat those facts herein. The Board adopts the ALJ's findings of fact as its own. Highly summarized, claimant was seriously injured when he fell approximately 50 feet while working on a grain bin. He was hospitalized following his injury and along with his orthopaedic injuries, lapsed into a coma, experienced prolonged endotracheal intubation and was eventually transferred to two separate rehabilitation hospitals.

Since his release from active treatment, claimant has been evaluated by several physicians. Dr. Paul S. Stein, a neurosurgeon, evaluated claimant at the request of his attorney on March 19, 2002. Dr. Stein provided a functional impairment for the orthopaedic injuries and ultimately deferred to the opinions expressed by the neuropsychologist, Dr. Mitchel A. Woltersdorf, for the appropriate impairment attributable to claimant's cognitive deficits.

¹ The ALJ also found that claimant sustained a 36.65 percent work disability under K.S.A. 44-510e. However, because claimant's 37.5 percent functional impairment exceeded his work disability, he was entitled to an award for the higher amount of functional impairment. K.S.A. 44-510e(a).

² Claimant's Brief at 7 (filed Aug. 4, 2004).

³ At oral argument the parties agreed that neither the functional impairment or work disability figures were in dispute nor the subject of this appeal.

At respondent's request, Dr. Woltersdorf examined claimant on three separate occasions. The first two sessions occurred on May 15 and 17, 2002, and involved a battery of tests which Dr. Woltersdorf used to base his opinions. Based upon these examinations, Dr. Woltersdorf concluded that claimant suffered a significant closed head injury to the right hemisphere of the brain, affecting his nonverbal memory, nonverbal problem-solving and his ability to get along with others. He testified that claimant is "faking good"⁴ as he does not want others to know he is struggling. He testified that claimant is not competitively employable and will likely struggle in complex social situations.⁵

Dr. Woltersdorf saw claimant a third time on October 3, 2002. He again administered the same battery of tests. He expressed concern that claimant would only be able to perform work in a sheltered workshop setting as claimant was now functioning in the borderline retarded range. He ultimately recommended claimant avoid working at heights, that he be evaluated with an on-road driving exam before being allowed to drive, and that he be restricted from working with tools and machinery unless closely supervised. Dr. Woltersdorf even went so far as to testify that claimant should not be driving in the course and scope of employment, although non-commercial driving was permitted. Finally, he indicated he believed claimant was not "competitively employable" due to the inappropriateness of his interpersonal skills. Dr. Woltersdorf concluded claimant is incapable of going on job interviews and interacting with his superiors and coworkers in a normal fashion. His only hope for employment would be a highly repetitious job that involved no contact with power tools, machinery or the public.

Dr. Woltersdorf was asked to consider some of the job possibilities outlined by Monte Longacre, a vocational consultant, retained by respondent. According to Dr. Woltersdorf, claimant is precluded from performing most if not all of the possible jobs outlined by Mr. Longacre either because the jobs involve contact with the public or coworkers. Further, Dr. Woltersdorf opined that based upon the task list created by Jerry Hardin, claimant bears a 52 percent task loss as a result of just his cognitive impairment.

Claimant was also examined by Dr. Philip R. Mills, a physician who purports to treat those with head and brain injuries. However, Dr. Mills conducted no psychological tests in order to assess claimant's level of functioning. He testified that claimant pictures himself as minimally disabled.⁶ Dr. Mills assigned a 33 percent functional impairment to the whole body, which includes 10 percent for the claimant's cognitive limitations. He also imposed limitations against working at heights and with dangerous equipment. When these restrictions were applied to Mr. Longacre's task list, Dr. Mills found claimant sustained a 13 percent task loss.

⁴ Woltersdorf Depo. (Jan. 26, 2004) at 13-14.

⁵ *Id.* at 15.

⁶ Mills Depo. at 6.

In spite of this bleak vocational picture, claimant returned to work for respondent following his injury, albeit with some memory problems. He performed his regular duties (except working at heights) from October 2001 until February 2002 at a comparable wage when he was terminated for his failure to have a driver's license. There is some confusion in the record as to whether claimant's license was suspended before his injury or after. It is clear, however, that claimant had numerous conversations with his employer about the need to get his driver's license reinstated. After a series of promises, that was not done. When claimant told his employer that the license would not be reinstated until June 2002, he was terminated. A valid driver's license is necessary for claimant's job.

Within a month claimant obtained employment with Abilene Machine Shop as a machinist and welder in March 2002. He worked for this employer for approximately four months before quitting because he was having trouble remembering things and felt he was wasting that employer's time plus he had truck trouble.⁷ There is no evidence in the record to corroborate claimant's contention that he was anything less than adequate at that job. Claimant worked 40 hours per week making \$7.50 per hour.

As noted by the ALJ, claimant's own testimony establishes that he has a long history of relatively short periods of employment before his accident. Suffice it to say, claimant has a habit of obtaining employment which he retains for relatively short periods of time and then quits or is terminated. The reasons for the separation vary from car trouble, failure to produce a social security card, accusations of theft, and/or fights with a co-worker. The ALJ put it best when he said that "[c]laimant's evidence establishes a persistent theme of short-term employments, from which he departed either because of vehicle trouble or disagreements with co-workers, suggesting poor job and interpersonal stability even before the accident of December 28, 2000."⁸

Claimant has not worked since working for Abilene Machine Shop and is presently not looking for employment.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows: "[p]ermanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment." The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*,⁹ held that "[t]he trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative

⁷ R.H. Trans. at 33.

⁸ ALJ Award (June 16, 2004) at 7.

⁹ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

intent.” The determination of the existence, extent and duration of the injured worker’s incapacity is left to the trier of fact.¹⁰

The ALJ concluded as follows:

Because [c]laimant demonstrated an **actual ability to work**, and work productively, subsequent to his accident of December 28, 2000, in contrast with the **theoretical inability to work** suggested by Dr. Woltersdorf, the Court is forced to conclude that [c]laimant retains the ability to engage in ‘substantial and gainful’ activity. Claimant has failed to sustain his burden of proof that he is permanently and totally disabled.¹¹

The Board agrees with the ALJ’s analysis and findings. Claimant’s post injury work history thus far does not comport with Dr. Woltersdorf’s predictions, theories and concerns. Claimant appears to have had some difficulty sustaining employment before he was injured on December 28, 2000. Although he has documented cognitive impairment as a result of his injury, it does not appear more probably true than not that his inability to retain his job was caused by that injury. It may well be that future evidence will be developed that suggests a change in claimant’s circumstances such that a trier of fact could conclude that claimant was capable of only a sub-minimum wage job such as that available in a sheltered work shop. Absent such evidence, the ALJ correctly determined that claimant failed to meet his burden of proof that he is permanently and totally disabled.

¹⁰ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

¹¹ ALJ Award (June 16, 2004) at 10.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated June 16, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John Hadley (Jay) Sizemore, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director